**CHOCK YOOK KWAI**

**v.**

**CHOCK YOOK CHOONG & ORS**

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: 22-559 OF 1993]
4 DECEMBER 2001

***LAND LAW:*** *Indefeasibility of titles and interest - Transfer of land - Whether tainted with fraud or fraudulent misrepresentation - Whether fraud proved beyond reasonable doubt - Instruments of transfer - Transfer not supported by proper consideration - Whether effected by means of void or insufficient instrument - National Land Code, ss. 340(1), (2)(a), (b)*

***CONTRACT:*** *Illegality - Agreement to transfer property - Whether tainted with fraud or fraudulent misrepresentation - Non est factum - Applicability - Whether agreement explained to plaintiff - Whether plaintiff understood nature of transaction - Contracts Act 1950, s. 26(a) - National Land Code, s. 340(2)(a)*

***CONTRACT:*** *Consideration - Sufficiency - Natural love and affection - Agreement by uncle to transfer property to nephew - Failure to prove natural love and affection - Whether transfer void - Whether lacking consideration - Contracts Act 1950, s. 26(a) - National Land Code, s. 340(2)(b)*

***WORDS & PHRASES:*** *"Natural love and affection" - Section 26(a) Contracts Act 1950*

The plaintiff and the first defendant were brothers and co-owners of two pieces of land ('the property'). On 26 June 1991 the plaintiff executed two memoranda of transfer ('MOT') and by that transferred his share in the property to the first defendant's sons and his nephews, the second and third defendants herein. The transfer allegedly was for consideration of natural love and affection, and was attested by a solicitor.

Subsequently, however, the plaintiff alleged that the transfer was void and consequently applied for an order that his share in the property be retransferred to him. The plaintiff argued that the transfer was void as: (i) the MOT was obtained through fraud and misrepresentation; (ii) he did not understand the nature or implication of the MOT when signing the same; and (iii) the transfer was devoid of consideration as there was no natural love and affection between

a him and his said nephews. The defendants retorted that there was no fraud or misrepresentation as the MOT had been explained to the plaintiff and was prepared at the mutual instruction of the plaintiff and the defendants.

In the court, evidence was put, *inter alia*, that the plaintiff did not trust the second and third defendants, and that the latter, apart from addressing the b plaintiff by name and only visiting him two or three times a year, had seldom mixed with the plaintiff's children. The questions that arose were: (i) whether the MOT was tainted with fraud or misrepresentation; (ii) whether non est factum applied to the facts and circumstances herein; (iii) whether natural love and affection could be said to have existed between the plaintiff and his c nephews; and (iv) whether the transfer was effected through void or insufficient instrument, and in any case, whether the indefeasibility provision of s. 340(1) of the National Land Code ('the Code') could be defeated on account of the absence of the consideration of natural love and affection.

**Held:**

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**[1]** The burden is on the plaintiff to prove beyond reasonable doubt that the registration of transfer was obtained through fraud or fraudulent means or misrepresentation. (p 171 e)

**[2]** The plaintiff has not established fraud beyond reasonable doubt to which e the defendants are parties or privies, under s. 340(2)(a) of the Code. Likewise, the plaintiff has also not established the fact of misrepresentation *ie*, fraudulent misrepresentation, actual fraud or dishonest intention on the part of the defendants beyond reasonable doubt. (p 175 a-d)

f **[3]** The plea of *non est factum* is established if it is shown that (i) the document signed was fundamentally or essentially different in substance or in kind from what the signer believed it to be; and (ii) the signer signed it with the care to be expected of a normal person of prudence. (p 177 d)

g **[3a]** The plaintiff has failed to establish *non est factum*. The MOT was explained by the attesting solicitor to the plaintiff and he signed it not as a witness but as a transferor. The fact that the plaintiff has pleaded that he has effected the transfer allegedly on account of love and affection shows that it was a transfer which he understood thereby removing any h plea of *non est factum*, or for that matter fraud or misrepresentation. (p 177 f-g)

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**[4]** For s. 26(a) of the Contracts Act to apply, two requirements must be fulfilled, namely, (i) the agreement is in writing and registered; and (ii) there must be natural love and affection between parties standing in near relation to each other. The burden is on the defendants to establish that the transfer of the property was supported by natural love and affection as consideration. (pp 178 b-h & 179 f)

**[5]** The word 'natural' in the context of 'natural love and affection' means inborn, spontaneous, happening in the usual course, related by actual birth. The word 'love' is denoted by fondness, an affection of the mind caused by that which delights, strong liking. The word 'affection', on the other hand, denotes an act of influencing, emotion, disposition, love or attachment. (p 179 b)

**[5a]** None of the elements or ingredients of natural love and affection existed as a matter of fact between the plaintiff and the defendants at any time leading to the execution of the MOT. Indeed, the second and third defendants had no natural love and affection whatsoever from the plaintiff and nor had they ever exuberated any natural love and affection for the plaintiff. (p 179 c)

**[6]** The plaintiff cannot be said to have transferred the property as gifts to the second and third defendants as the element of natural love and affection has never been established. As there was no emotional attachment or feeling between the plaintiff and second and third defendants, s. 26(a) of the Contracts Act 1950 did not apply to the facts of this case nor to persons standing in the position of uncle and nephew. It follows that the transfer was obtained through void or insufficient instrument as envisaged by s. 340(2)(b) of the Code. (p 181 g)

*[Plaintiff's claim allowed.]*

**Case(s) referred to:**

*Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC* ***(refd)***
*Assets Company Ltd v. Mere Roihi [1905] 1 AC 176* ***(refd)***
*Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 2 MLJ 196* ***(refd)***
*Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85* ***(refd)***
*Foster v. Mackinnon [1869] LR 4 CP 704* ***(refd)***
*Goh Hooi Hyin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48 HC* ***(dist)***
*Goh Jong Cheng v. MB Melwani Pte Ltd [1991] 1 MLJ 482* ***(dist)***
*In Re Tan Soh Sim, Deceased; Chan Lam Keong & Ors v. Tan Saw Keow & Ors [1951] 17 MLJ 21* ***(refd)***
*Jafar Ali v. Ahmed Ali [1868] 5 BHC* ***(refd)***
*Kwan Teck Meng & Ors v. Liew Sam Lee [1963] MLJ 333* ***(refd)***

*Lo Hieng Chiong v. Kok Tek Shin [1983] 1 MLJ 31* ***(refd)***
*M Ratnavale v. S Lourdenadin; M Mahadevan v. S Lourdenanin [1988] 2 MLJ 371* ***(refd)***
*Nallammal & Anor v. Karuppanan & Anor [1993] 3 MLJ 476* ***(refd)***
*PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136* ***(refd)***
*Poonoo Bibee v. Fyez Buksh [1874] 15 BLR App 5* ***(refd)***
*Queck Poh Guan v. Quick Awang [1998] 6 MLJ 388* ***(refd)***
*Saminathan v. Pappa [1981] 1 MLJ 121* ***(refd)***
*Saunders v. Anglia Building Society [1971] AC 1004* ***(refd)***
*Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC* ***(refd)***
*The First National Bank Of Chicago v. How Lee Realty Pte Ltd & Ors [1981] 1 MLJ 183* ***(dist)***
*Throughgood's Case [1584] Co Rep 9a 76 ER 408* ***(refd)***
*Venkatasamy v. Rangasamy [1903] 13 Mad LJ 428* ***(refd)***
*Waimiha Sawmilling Company v. Waione Timber Company Ltd [1926] AC 101* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, s. 26(a)
Evidence Act 1950, s. 114(g)
National Land Code, s. 340(1), (2)(a), (b)
Real Property Gains Tax Act 1976, para 12, sch 2
Contracts and Specific Relief Act [India], s. 25(1)

**Other source(s) referred to:**
Pollock & Mulla, *Indian Contract And Specific Relief Act*, 10th edn, p 300

*For the plaintiff - SL Chow (LC Chua); M/s Chan Leong & Co*
*For the defendants - Kemkumar S Lopez; M/s Kamarudin & Partners*

*Reported by WA Sharif*

## JUDGMENT

**Low Hop Bing J:**

**Plaintiff's Claim**

Both the plaintiff and the 1st defendant are brothers, while the plaintiff is an uncle of both the 2nd and the 3rd defendants who are the 1st defendant's sons.

The plaintiff's statement of claim avers, *inter alia*, as follows:

1. The plaintiff and the 1st defendant were originally co-owners of equal share of two pieces of agricultural land held under EMR No. 3231 Lot No. 1236 ("Lot 1236") and EMR 3233 Lot 1239 ("Lot 1239"), both in the Mukim of Serendah, District of Ulu Selangor, State of Selangor ("the said property"), which were given by both the plaintiff's and the 1st defendant's late father in 1967.

2. On or about 26 June 1991, two memoranda of transfer ("the said MOT") were signed, transferring Lot 1236 to the 3rd defendant and Lot 1239 to the 2nd defendant.

3. The plaintiff particularised that the 1st, 2nd and/or the 3rd defendants have fraudulently induced the plaintiff to transfer the plaintiff's respective share in the said property and that the 1st, 2nd and/or the 3rd defendants have misrepresented to the plaintiff that the plaintiff was helping the plaintiff's brother, the 1st defendant, and signed as a witness.

4. Alternatively, the plaintiff avers that when he signed the said MOT, he did not understand the nature or implication of the said MOT and he would not have signed them if he had so understood.

5. The plaintiff also avers that the transfers of the plaintiff's respective share in the said property are void for want of consideration as the uncle-nephew relationship does not constitute a valid consideration on account of love and affection. The plaintiff further avers that the registrations of the transfer of plaintiff's respective share in the said property were obtained by means of insufficient and/or void instruments.

6. The plaintiff prays for the following relief:

(1) against the 1st, 2nd and 3rd defendants for damages, interest, costs and such further or other relief as the court may grant.

(2) against the 2nd and 3rd defendants, for:

(a) an order directing the 2nd defendant to retransfer to the plaintiff an undivided half share in Lot 1239, free from encumbrances and at the 2nd defendant's expense;

(b) an order directing the 3rd defendant to retransfer to the plaintiff an undivided half share in Lot 1236, free from encumbrances and at the 3rd defendant's expense;

(c) an injunction restraining the 2nd and/or 3rd defendants, their agents or servants from disposing of or dealing in any way with the plaintiff's respective share in the said property; and

(d) such further or other relief.

**Defence**

The defendants' defence avers that:

1. The said property was transferred to the 2nd and 3rd defendants on account of love and affection and that execution of the said MOT was effected in the presence of and attested by an advocate and solicitor and so all allegations of fraud and misrepresentation do not exist.

2. As the said advocate and solicitor is a Chinese, the defendants put the plaintiff to strict proof of his allegation that he was not explained and did not understand the nature or implication when signing the said MOT.

3. The said MOT is valid according to the provisions of the National Land Code, and deny the plaintiff's allegation of insufficient and/or void instrument.

**Finding Of Facts After Full Trial**

The plaintiff's evidence revealed that his late father, Chock Mun Tin, had transferred the said property to the 1st defendant and him in equal share in 1967 and that the said property is now registered in the names of Chock Kim Yiew (Lot 1236) and Chock Kim Chang (Lot 1239) after the said MOT was registered at the relevant land office.

On the execution of the said MOT, the plaintiff testified that his brother, 1st defendant (DW4) had informed him that the 1st defendant wanted to transfer his own shares in the said property to the 2nd defendant (DW2) and 3rd defendant (DW3) and that the 1st defendant needed the plaintiff's help to sign a few documents as a witness.

The plaintiff had agreed to do so because DW4 is his only brother who is still alive and whom he trusted. The plaintiff thought that he was going to sign only as a witness to the documents for transferring DW4's shares in the said property to DW2 and DW3.

The defendants appointed a firm of solicitors *viz*. M/s. T.C. Chong & Rakan-rakan ("the legal firm"), for the preparation and finalisation of the transfer of the said property. The defendants also arranged to fetch the plaintiff from his shop to the legal firm using DW2's car. That was the plaintiff's first visit ever to the legal firm. During that visit, the plaintiff, DW4, DW4's wife, DW2 and DW3 were attended to by an advocate and solicitor (DW1).

The plaintiff is illiterate in Bahasa Malaysia and English, but attended a Chinese school for some three years. He claimed that he did not know what the documents were nor understood the contents of documents given to him for signing at the legal firm.

When DW1 asked (in Cantonese) the plaintiff to sign the said MOT, the plaintiff claimed that the content thereof was not explained to the plaintiff and the plaintiff had signed, assuming that he did so as a witness. The plaintiff testified that he would not have signed the said MOT if he had known that it was for transferring his half share in the said property to DW2 and DW3 respectively.

The plaintiff did not give any instructions and paid no legal fees or disbursements to anyone in the legal firm. The address stated in the said MOT ie, No. 12, Jalan Mata Air 4, Taman Genting Setapak, 53200 Kuala Lumpur was not his address then, which actually was at No. 5, Jalan Bunga Kantan, Taman Forlong, Setapak.

In May 1992, when the plaintiff's son, Chock Kim Chong (PW2) knew of the plaintiff's visit to the legal firm, PW2 became suspicious. The plaintiff together with PW2 then went to see DW4, requesting to look at the titles for the said property.

DW4 refused to show the titles but promised to retransfer plaintiff's shares in the said property in November or December 1992 when DW3 returned from Penang.

Plaintiff and PW2 again saw DW4 in December 1992 to inform DW4 that the said property belonged to the plaintiff.

In December 1992, the plaintiff also requested his uncle, PW3, to ask DW4 to retransfer plaintiff's respective share in the said property to the plaintiff, but DW4 refused.

Subsequently, a search at the relevant land office in January 1993 confirmed that the plaintiff's respective share in the said property had been transferred to DW2 and DW3 for consideration of love and affection. Thereupon, the plaintiff entered caveats on the said property in January 1993 and lodged a police report against DW4, DW2 and DW3.

Under cross-examination, the plaintiff affirmed that DW1 only asked him to sign the said MOT, without any explanation that the said MOT was actually intended to transfer plaintiff's respective share in the said property to DW2 and DW3 and that it was DW4 and not DW1 who told plaintiff that plaintiff was signing the documents at the legal firm as a witness.

Prior to 1991 although the plaintiff was close to DW4 and trusted him, nevertheless, it was not the case with DW2 and DW3.

In re-examination, the plaintiff testified that DW2 and DW3 addressed him by calling his name since they were young, and only visited him two to three times a year, but not during Chinese New Year and/or other festivals. DW2 and DW3 seldom mixed with plaintiff's children.

PW2, plaintiff's eldest son, is DW4's nephew and a cousin of DW2 and DW3.

PW2 is working together with PW1 in a tyre shop known as Wing Chuan Trading Sdn. Bhd. in Setapak. PW2 also has four siblings *viz*. Chock Kin Chong (male), Chock Mei Ling (female), Chock Kin Fook (male) and Chock Kim Peng (male).

Prior to 1991 both PW1's family and DW4's family only met once or twice a year, but not after 1991, when PW1 realised the abovesaid transfer of the plaintiff's half share in the said property.

During the year of 1991, DW4, Chua Ah Moi (DW4's wife) and DW2 had come to the tyre shop in Setapak to fetch PW1, but PW2 was not aware of the place to which they brought PW1. In 1992, PW1 informed PW2 that the defendants had brought him to a legal firm to sign some documents as a witness. At that moment PW2 felt something had gone amiss and brought PW1 to see DW4 in Shah Alam, for the purpose of looking at both the land titles which were with DW4, but PW1 was unable to do so.

PW2 subsequently brought PW1 twice to see PW2's grand uncle, Mr. Check Mun Chong (PW3) who is PW1's and DW4's uncle, to seek PW3's assistance to persuade DW4 to retransfer PW1's share in the said property to PW1, but the defendants refused to do so.

PW3 testified that from 1991 to 1993, DW4 was residing next to his house in Shah Alam and they maintained their contact. PW3 confirmed that both PW1's family and DW4's family did contact each other previously, but not after the transfer of the said property.

DW1, the advocate and solicitor who attested the transfer of the said property, was a legal assistant in M/s TC Chong & Rakan-rakan, in charge of conveyancing and banking documentations. DW1 could speak the Hokkien, Cantonese and Hakka dialects. DW1 explained in English and Cantonese to all those in a group who were present in the legal firm about the nature of the transfer and PW1 was agreeing in silence.

DW1 is an independent witness having no interest in this dispute. DW1 met PW1, DW2, DW3, DW4 and DW4's wife at the legal firm. DW1 was acting on behalf of the transferees (DW2 and DW3) in this transaction.

In her evidence given during the cross-examination as to whether DW1 explained the nature of the transfer to them one by one, DW1 gave evidence that she explained to them in a group.

DW1 was unable to recall whether PW1 understood the nature of the transfer although DW1 thought that the whole group understood the nature of the transaction.

DW1 admitted that she did not expressly ask whether plaintiff understood the nature of the transaction.

It is my specific finding that the evidence of DW1 is independent and credible and I accept her evidence as adumbrated above, in particular the content of the MOT was explained to the entire group including the transferor i.e. the plaintiff and the nature and implication of the transaction contained therein.

DW2 testified that PW1's and DW4's families had once stayed together since he was born until 1982, but DW2 visited his grandmother in the old house until his grandmother's death in 1985.

DW2 claimed that the relationship between DW4's and PW1's families was very cordial after the transfer of the said property, but no longer so when DW4 was arrested by the police, charged in court and acquitted.

DW2 drove his mother, his father (DW4), PW1 and DW3 to the legal firm. DW3 confirmed this. DW2 said that in the legal firm, DW1 explained to them the transfer was for transferring DW4's and PW1's shares to the sons or nephews respectively, and no money was paid for the transfer. DW2 added that DW1 spoke to them in Cantonese only. DW1 obtained their identity cards and passed them to the clerk for typing and thereafter to bring the said MOT to DW1. Titles to the said property were given by DW4 to DW1 through DW2. PW1 agreed to sign. They did not persuade PW1 to sign. DW3 confirmed this evidence substantially. DW2 said the reason for the transfer was because the said property belong to his family and DW4 paid the legal fees and disbursements to the legal firm.

DW2 could not recall how often he kept in touch with PW1 before 1991, but only fetched his parents to visit PW1 during Chinese New Year and not when someone else could replace him in fetching his parents. DW2 had never given PW1 any pocket money nor taken PW1 out for a meal or sightseeing or visited him when he fell ill. DW2 confirmed that his love for DW4, his father, is different from that for PW1 his uncle.

DW3 testified that the relationship between the two families was good since he was small but it turned bad after DW4 was arrested by the police. He added that at the time the MOT was signed, the relationship between the two families was "baik dan mesra" (good and cordial). DW3 claimed to have a good and cordial relationship with the plaintiff.

DW4 denied asking PW1 to sign as a witness for transfer of the said property. He also denied having cheated, lied or misrepresented to PW1 in order to induce him to transfer the plaintiff's respective share to DW2 and DW3, but that the plaintiff did it willingly.

He said that the reasons for the transfer was that between 1982 and 1983, DW4's mother talked to him that four pieces of land were to be transferred to him with four sons and three other pieces of land to PW1 with three sons but this remained unsupported and unconfirmed. DW4 added that the arrangement to go to the legal firm was made by DW2 and that he paid the legal fees and gave the title deeds to DW1.

**Submission For Plaintiff**

Cik SL Chow, assisted by Encik LC Chua, learned counsel for the plaintiff, submitted that the 1st, 2nd and 3rd defendants have fraudulently induced and/or misrepresented to the plaintiff into transferring the plaintiff's respective share in the said property to the 2nd and 3rd defendants, as they contended that when the plaintiff signed the said MOT, he did not understand the nature or implication of the said MOT which the plaintiff would not have done had the plaintiff so understood, relying on the doctrine of *non est factum*.

It was argued that there was no valid consideration on account of love and affection as between the plaintiff and the 2nd and 3rd defendants who stand in the relationship of uncle and nephews to each other.

The plaintiff then contended that the said transfer was obtained by means of insufficient and/or void consideration.

**Defendants' Case**

The defendants' case is that the transfer of the said property took place for the consideration stated in the MOT prepared by solicitors on the instructions of the plaintiff and the defendant and explained to them by DW1 who attested their signatures.

Encik K Lopez, learned counsel for the defendants, submitted that the burden of proof is on the plaintiff to establish fraud beyond reasonable doubt, and that there is no provision in the National Land Code ("the Code") to defeat

the indefeasibility provisions of s. 340(1) of the National Land Code by vitiating contractual circumstances, *non est factum* or absence of consideration on account of love and affection.

He added that the plaintiff has failed to establish fraud and that the allegation of fraud or misrepresentation is a fabricated afterthought. The plaintiff in his view is merely relying on the absence of consideration based on love and affection.

It was argued for the defendants that there was a gap in the evidence of PW1 and PW2 with regards to the visit in May 1992 and so the evidence was inconsistent, unreliable and untruthful. He said that DW4's evidence is the logical and credible account of the actual events.

The defendants contended that the plaintiff has failed to produce the police report which he had lodged and so the provisions of s. 114(g) of the Evidence Act 1950 should be invoked against the plaintiff. As DW4 was acquitted by the magistrate in Kuala Lumpur without defence being called, it was further submitted that this is the plaintiff's second bite at the cherry, as there was no fraud established against the defendants.

On the issue of misrepresentation, it was contended for the defendants that the plaintiff has the burden of proving fraudulent misrepresentation as a species of fraud which therefore must be proved beyond reasonable doubt, but which the plaintiff has failed to do so.

The defendants also contended that the plaintiff has failed to prove *non est factum*, as it was argued that the plaintiff should have known that he was not required to be a witness.

On the issue of love and affection, it was canvassed for the defendants that the plaintiff has to prove that love and affection between uncle and nephews is not a valid consideration in law, and the plaintiff has failed to do so. It was also stated for the defendants that s. 26(a) of the Contracts Act 1950 permits the relationship of uncle and nephews to constitute natural love and affection.

Finally, it was the defendants' case that the transfer was effected as a result of valid or sufficient consideration.

**Decision Of The Court**

*Fraud Or Misrepresentation*

Section 340(1) of the Code provides, in effect, for the general doctrine of indefeasibility ie, the title or interest of any person or body for the time being registered as proprietor of any land shall be indefeasible.

Section 340(2), *ibid*, contains exceptions to the above general doctrine. Relevant to the issue of fraud or misrepresentation is s. 340(2)(a) which expressly provides that the title or interest of any such person or body shall not be indefeasible in any case of fraud or misrepresentation to which the person or body, or any agent thereof, was a party or privy.

Under s. 340(2)(a), "fraud" means actual fraud, dishonesty of some sort, not constructive or equitable fraud: per Lord Lindley in *Assets Company Ltd v. Mere Roihi* [1905] 1 AC 176 PC; *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC; *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 FC; *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 FC.

"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent" per Lord Buckmaster in *Waimiha Sawmilling Company v. Waione Timber Company Ltd* [1926] AC 101 PC. In *Goh Hooi Hyin v. Lim Teong Ghee & Ors* [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48, Edgar Joseph Jr, J (later FCJ) went a step further and said:

> It is not enough to show that the transfer had the effect of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the intention of cheating the plaintiff of such right.

As the plaintiff is alleging fraud, the burden is on the plaintiff to prove beyond reasonable doubt that the registration of the transfer was obtained through fraud or fraudulent means: *Saminathan v. Pappa* [1981] 1 MLJ 121 PC.

The fraud or misrepresentation may arise at the point of the execution of the agreement or at the point of registration of the interest: *M Ratnavale v. S Lourdenadin; M Mahadevan v. S Lourdenanin* [1988] 2 MLJ 371 FC.

Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case; *Tai Lee Finance*, *supra*, *PJTV Denson*, *supra*.

By way of illustration, in *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 2 MLJ 196, the respondent, Tara, was the registered proprietor of a five-acre piece of land with a house erected thereon ("the proprietor"), and she lived there with her late husband (Devan) and their five daughters. One Dr Das was Devan's brother. The three appellants were advocates and solicitors. Dr Das was in financial difficulty and with Jagindar as guarantor managed to obtain short-term overdraft facilities. Dr Das consulted Devan when Devan was alive and Devan persuaded Tara to put up the property as security. On 30 March 1974, the three appellants came to Tara's house and asked Tara to sign various documents. Tara questioned Suppiah, one of the appellants, about the

use of the word "transfer" when the transaction was going to be a security, to which Suppiah answered that the security was by way of transfer. Jagindar attested and dated the transfer form as 5 July 1975 which Tara signed earlier to transfer the property to Suppiah. The transfer was registered on 22 July 1975. Some 18 days later Suppiah transferred the property to one Arul on 9 August 1975. Later on Jagindar instructed that the property be transferred to Jet Age Construction Company which was wholly owned by Jagindar. The property was eventually subdivided into 70 lots and sold to the public. So Tara was unable to get the property back. On the evidence, the learned judge of the High Court held that the three appellants were not honest in that, *inter alia*, all they wanted was mainly to get the respondent to sign the transfer form so that they could lay their hands on the property at the time of their choosing. This was upheld by the Federal Court through the judgment of Lee Hun Hoe CJ (Borneo) (as he then was) who described the transaction as a defrauder's act or conduct that the court is concerned with. The Federal Court's judgment was also upheld by the Privy Council.

In *Lo Hieng Chiong v. Kok Tek Shin* [1983] 1 MLJ 31, the learned trial judge found that there was a conspiracy between the appellant and one Bong to cheat the respondent; prior to this, Bong had approached one Thian to join the scheme but Thian had refused and then warned the respondent who was a farmer. The conspiracy to cheat was held to constitute fraud and the purported exchange of lands on 7 February 1977 between the appellant and the respondent was declared void. This first instance decision was upheld by the Federal Court where the judgment which was delivered by Syed Othman, FJ (as he then was) contains the following passage:

> As regards the law, it has been said that the courts have so far not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true. Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming benefit of it is able to repel the presumption by contrary evidence proving to have been in point of fact, fair, just and reasonable; per Lord Selborne LC in *Earl of Aylesford v. Morris* [1873] 8 Ch App 484, 491. See also *Fry v. Lane* 40 Ch D 312.
>
> In *Derry v. Peek* [1889] 14 App Cas 337, 374 it was held that to establish fraud it is necessary to prove the absence of an honest belief in the truth of that which has been stated; in the words of Lord Herschell "Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false".

On the other hand, *Tai Lee Finance, supra*, provides an example where fraud was established in the High Court but set aside by the Federal Court. There the first respondent Ngan Kim Yong (chargor) the registered proprietor of a piece of land executed two separate charges over the said land in favour of the appellant on 4 February 1970 and 10 March 1970 respectively to obtain two loans. Both charges were registered. As the chargor has defaulted in payment, the chargee applied for an order for the sale of the said land and obtained an order in default of appearance. The default order was set aside by the second to seventh respondents ("the respondents"). The chargor was a developer who had during the second half of 1996 entered with each of the respondents to build houses for them. When the respondents became aware of the charge sometime in the month of August 1970, they lodged caveats. On the above facts the learned judge of the High Court held that the appellant had constructive notice of the respondents' interest in the land, as at the time the charge was executed, the chargor was bound by contract to sell the land to the respondent, and that the appellant's demand for the sale of the land in the face of such notice is unconscionable and constituted a fraud on the respondents, by virtue of s. 340(2)(a) of the Code. On appeal, the Federal Court held that at the very most the appellant had constructive notice of the respondents' prior beneficial interests, but that there was no evidence of fraud to which the appellant was a party. The Federal Court held that the respondents had not proved beyond any reasonable doubt that the appellant had acted dishonestly, wilfully and consciously or violating the rights of the respondents or in any way in collusion with the chargor. In the circumstances, the Federal Court allowed the appeal and granted an order for sale.

In *M Ratnavale v. S Lourdenadin; M Mahadevan v. S Lourdenadin, supra*, the first appellant M Retnavale who was the registered proprietor of a piece of land in Kuala Lumpur entered into an agreement for the sale and purchase of the land for RM93,000. As there was a delay in the completion of the sale, the first appellant terminated the said agreement and entered into another sale and purchase with the second appellant, M Mahadevan who was one of the executors of the estate of the first appellant's deceased husband. The second appellant became the new registered proprietor of the land. On these facts, the Federal Court held that there was no evidence of conspiracy and fraud to implicate the first appellant save for the evidence of family relationship with the second appellant which was insufficient to infer conspiracy to defraud.

As alluded to above, the question of what constitutes fraud is wholly and exclusively a question of fact which may only be established by reference to the evidence adduced in each particular case. There can be no rigid formula of what constitutes fraud. The aforesaid cases merely provide illustrations of judicial determination of what could amount to fraud.

On the finding of facts as noted above, I am of the view that the plaintiff has not established fraud beyond reasonable doubt to which the defendants are parties or privies, under s. 340(2)(a) of the Code. I would further add that the plaintiff has also not established fraud even on the lower standard of proof ie, on a balance of probabilities applicable in civil cases generally, as was held by the Federal Court in *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497 per Chong Siew Fai CJ (Sabah and Sarawak) (as he then was).

I shall now consider the issue of misrepresentation for the purposes of s. 340(2)(a) of the Code. The word "misrepresentation" means fraudulent misrepresentation, actual fraud or some sort of dishonest intention or even both, as has been demonstrated by the Federal Court through the judgment of Lee Hun Hoe CJ (Borneo) in *Datuk Jagindar Singh & Ors, supra*.

Reverting to the finding of facts in the instant case, I hold that the plaintiff has also not established the fact of misrepresentation ie, fraudulent misrepresentation, actual fraud or dishonest intention on the part of the defendants beyond reasonable doubt as envisaged in s. 340(2)(a) of the Code, and not even on a balance of probabilities in civil cases generally: *Ang Hiok Seng & Ang Yeok Seng, supra* FC.

**Execution Of The Said MOT**

Since the plaintiff alleges that he had signed the said MOT without understanding the nature or implication of the MOT, thereby relying on the doctrine of *non est factum* (it is not my deed), to say that the said MOT is void, as a result of which the defendants have no right in law to make use of the said MOT. This burden is the burden applicable to civil cases generally and may be discharged by adducing evidence on a balance of probabilities and not the higher burden based on a standard beyond reasonable doubt.

In *Nallammal & Anor v. Karuppanan & Anor* [1993] 3 MLJ 476, 485, Lim Beng Choon, J (as he then was) traced the origin and development of the doctrine of *non est factum* in English courts ie, "the plea of *non est factum*" was formerly held by the English judges to be available only if the mistake was as to the very nature of the transaction – if a party had been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he could successfully plead *non est factum* in an action against him – see *Foster v. Mackinnon* [1869] LR 4 CP 704 at p. 711. The law on this subject was completely reviewed and restated by the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004 where it was held that in exceptional cases, the plea was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. Their Lordships appear to have directed

their minds on the disparity between the effect of the document actually signed and the document as it was believed to be. It was also held that the disparity must be 'radical', 'essential', 'fundamental', or 'very substantial'.

In *Nallammal & Anor*, *supra*, the facts revealed that the first plaintiff, the registered proprietor of a piece of land, at the first defendant's request, loaned the title of the land to the first defendant believing that it was for some contract works and on condition that the title be returned to her within a month or two. The first defendant later brought a document for the first plaintiff to affix her thumbprint on, as told by the first defendant who did not tell the first plaintiff anything about the contents of the said document. The first defendant used the title as security for a loan obtained from the second defendant. Lim Beng Choon, J had no doubt that the first defendant did defraud the plaintiff by way of misleading the plaintiff in order to get possession of the title to the land. The learned judge also invoked the doctrine of *non est factum* and therefore allowed the plaintiffs' claim for, *inter alia*, a declaration that the documents purported to be signed by the first plaintiff were null and void.

In *Goh Jong Cheng v. MB Melwani Pte Ltd* [1991] 1 MLJ 482, the facts in the headnote are as follows:

> The plaintiff was the registered proprietor of a piece of property (the 'property'). The defendant had extended credit facilities to a company (the 'company') of which the plaintiff's son was a director. The plaintiff had handed the title deeds of the property to her son and had later been accompanied by her son to the solicitor's office whereby she signed two sets of a mortgage deed mortgaging the property to the defendant. The same solicitor acted for the plaintiff and the defendant in the transaction, and the plaintiff's son acted as an interpreter between the solicitor and the plaintiff. The plaintiff's son subsequently requested a return of the mortgage deed from the solicitor, and the deeds were returned to the plaintiff. The solicitor later lodged a caveat in the registry against the property in respect of the defendant's interests.
>
> The plaintiff sought a declaration that no equitable mortgage had been created by the deposit of the title deeds and that the caveat lodged by the defendant against the property be cancelled. The issue before the court was whether the plaintiff did knowingly hand the title deeds of the property to her son and whether the doctrine of *'non est factum'* applied.

Chao Hick Tin, JC of the Singapore High Court after referring to the origin of this doctrine in *Throughgood*'s Case [1584] Co Rep 9a 76 ER 408 and the House of Lords' decision in *Saunders, supra*, held that the plaintiff has succeeded in pleading *'not est factum'* as:

(i) The plaintiff did not know when she handed the title deeds to her son that they were to be used as security for credit facilities to be granted by the defendant to the company.

(ii) Although the solicitor may have explained the general nature of the deed to the plaintiff, the solicitor did not explain the mortgage deed sentence by sentence to the plaintiff in Hokkien.

In *The First National Bank Of Chicago v. How Lee Realty Pte Ltd & Ors* [1981] 1 MLJ 183, the 4th defendant who was illiterate signed a deed of guarantee but did not know that it was for an unlimited amount. The contents were never explained to her by either the attesting lawyer or the bank. D'Cotta, J of the Singapore High Court held that the 4th defendant has succeeded in establishing *'non est factum'* and the plaintiff's claim against the 4th defendant was dismissed. The learned judge said that the burden of establishing *'non est factum'* is a heavy burden which lies on the person seeking to avail himself of it. The plea is established if it is shown that:

1. The document is signed was fundamentally or essentially different in substance or in kind from what the signer believed it to be (a mistake about the amount of the liability involved may make such a difference); and

2. The signer signed it with the care to be expected of a normal person of prudence.

The facts in the aforesaid cases (in which the plea of *non est factum* was upheld) are substantially different from the facts of the case before me in that the said MOT has been explained by the attesting advocate and solicitor (DW1) to the plaintiff in particular and to the whole group in general and the plaintiff has signed the said MOT not as a witness but as a transferor. The fact that he has pleaded that he has effected the transfer allegedly on account of love and affection shows that it was a transfer which he has understood and which would thereby remove any plea of *non est factum*, or for that matter fraud or misrepresentation as alluded to above.

Had he signed as a witness, he would not have been able to raise the consideration of the transfer on account of natural love and affection. I therefore hold that on the facts of the instant case, the plaintiff has not succeeded in discharging the burden of establishing *'non est factum'*.

The aforesaid finding leads me to the consideration of the issue as to whether a transfer based on love and affection in the instant case is sufficient consideration in law.

**Natural Love & Affection**

Paragraph 11 of the plaintiff's statement of claim avers that the transfer of the said property is void for want of consideration as the consideration of love and affection cannot exist either in fact or in law between uncle and nephews. The determination of this question would call for a judicial construction of the provisions of s. 26(a) of the Contracts Act 1950, the relevant portion of which reads as follows:

> 26. Agreement without consideration, void, unless:
>
> An agreement made without consideration is void, unless:
>
> it is in writing and registered;
>
> (a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;

Whether there is in fact any natural love and affection may be determined by reference to the evidence adduced and the surrounding circumstances: *Kwan Teck Meng & Ors v. Liew Sam Lee* [1963] MLJ 333; *Queck Poh Guan (As Administrator Of The Estate Of Sit Kim Boo, Deceased) v. Quick Awang* [1998] 6 MLJ 388.

Since the defendants are insisting that the transfers of the said property by the plaintiff to the 2nd and 3rd defendants are supported by natural love and affection as consideration, the burden of proof is on the defendants to establish this fact. It is necessary for me to evaluate the evidence adduced herein in order to determine whether natural love and affection ever existed at any time leading to the said transfer. The plaintiff was never close to the 2nd and 3rd defendants nor trusted them. The 2nd and 3rd defendants addressed the plaintiff who is their uncle by calling his name, and visited him two or three times a year but not during Chinese New Year or other festivals. They never mixed with the plaintiff's children. The 2nd defendant could not recall how often he kept in touch with PW1 before the said transfer, and had never taken the plaintiff out for a meal, sightseeing nor visited the plaintiff when plaintiff fell ill. The 2nd defendant confirmed that his love for the plaintiff was different from his love for his own father DW4. The furthest that the evidence of the 3rd defendant could prove was that at the time the said MOT was signed, the relationship between the plaintiff's family and the defendants' family was good and cordial. On the basis of the plaintiff's evidence and the defendants' evidence, I am unable to conclude that there was any natural love and affection existing between the plaintiff and the 2nd and 3rd defendants who stand in the position of uncle and nephews respectively.

The expression "natural love and affection" has not been defined in s. 26(a), *supra*, and so the ordinary popular dictionary meaning applies.

In ordinary parlance, "natural" in the context of "natural love and affection" in my view means inborn; spontaneous; happening in the usual course; related by actual birth (not adoption).

The word "love" is denoted by fondness; an affection of the mind caused by that which delights; strong liking.

The word "affection", denotes an act of influencing; emotion; disposition; love or attachment: (See *Chambers Twentieth Century Dictionary*).

It seems clear to me that none of the aforesaid elements or ingredients of natural love and affection existed as a matter of fact between the plaintiff and the defendants, at any time leading to the execution of the said MOT. Least of all, it is my specific finding that the 2nd and 3rd defendants who are the transferees have no natural love and affection whatsoever from the plaintiff nor had these two defendants ever exuberated any natural love and affection for the plaintiff.

There is in my view a special position, meaning and dimension attributed to the expression "natural love and affection", both in fact and in law.

In my considered opinion, in the case of the natural parents and their children, a presumption of natural love and affection arises so that a valid consideration is constituted in law for the purposes of s. 26(a), *supra*.

For s. 26(a) to apply, two requirements must be fulfilled, *viz*. the agreement is in writing and registered; and there must be natural love and affection between parties standing in near relation to each other.

In India, from which we derived our inspiration to legislate our Contracts Act 1950, the expression "near relation" in s. 25(1) of the Indian Contracts and Specific Relief Acts have not been judicially construed, but it has been held, before Indian Contracts and Specific Relief Acts, that the relation of cousins would not support a voluntary agreement though registered: *Jafar Ali v. Ahmed Ali* [1868] 5 BHC, ACJ 37. Under the said Acts, Indian courts have, by way of illustration, held the following parties to be standing in a near relation to each other:

(1) A registered agreement between husband and wife to pay his earnings to her: *Poonoo Bibee v. Fyez Buksh* [1874] 15 BLR App 5.

(2) A registered agreement whereby A on account of natural love and affection for his brother B, undertakes to discharge a debt due by B to C. In such a case, if A does not discharge the debt, B may do so and sue A to recover the amount: *Venkatasamy v. Rangasamy* [1903] 13 Mad LJ 428; (See p. 300, Pollock & Mulla, *Indian Contract And Specific Relief Act*, 10th edn).

In our country, the provisions of s. 26(a), *supra*, in particular the words "near relation" were called into question in *In Re Tan Soh Sim, Deceased; Chan Lam Keong & Ors v. Tan Saw Keow & Ors* [1951] 17 MLJ 21. Taylor, J delivered the leading judgment and said:

> The words "relationship" and "near" must be applied and interpreted in each case according to the mores of the group to which the parties belong and with regard to the circumstances of the family concerned.

The judgment of Briggs, J in the same case illuminated as follows:

> The other requirement of section 26 is that the agreement should have been made "on account of natural love and affection between parties standing in a near relation to each other." In the phrase "natural love and affection" I think full effect must be given to the word "natural", and that it means not only "reasonably to be expected", but "reasonably to be expected, having regard to the normal emotional feelings of human beings." This immediately establishes the connection of these words with the later phrase "standing in a near relation." That phrase indicates in my opinion, that the "emotional feelings" required are of a special type, that is to say, they are such feelings as may ordinarily be expected to spring from the fact of the "near relation." If either the feelings or the relation are lacking, the section does not apply.

Illustration (b) of s. 26(a) provides for the relationship of father and son, in the following words:

> (b) A, for natural love and affection, promises to give his son, B $1,000. A puts his promise to B into writing and registers it under a law for the time being in force for the registration of such documents. This is a contract.

Section 26(a) was again judicially considered in *Quek Poh Guan (as administrator of the estate of Sit Kim Boo, deceased) v. Quick Awang, supra.* In that case, the plaintiff is the administrator of the estate of one Sit Kit Boo (the deceased) while the defendant was the son of the deceased and one of the beneficiaries of the estate. The deceased was the owner of 1/3 portion of a piece of land. A few days before the deceased's death, the latter had executed a transfer of the land to the defendant who had assumed greater responsibility towards the care and well being of his deceased mother as compared to the plaintiff and the other children. Idris, J (as he then was) dismissed the plaintiff's

application for declaration that the instrument of transfer was void for non compliance with s. 26(a) and held that the transfer of the land was a gift from the deceased mother to the defendant on account of natural love and affection based on the relationship of money and son and is thus valid.

Paragraph 12 in sch. 2 to the Real Property Gains Tax Act 1976 does provide some guidelines pertaining to the extent of disposal of real properties by way of love and affection ie, in the form of gifts, in the following words:

> 12. Where an asset is disposed of by way of a gift, the disposal shall be deemed to be a disposal at the market value of the asset:
>
> Provided that, where the donor and recipient are **husband and wife, parent and child or grandparent and grandchild**, and the gift is made within five years after the date of acquisition of the asset by the donor, the donor shall be deemed to have received no gain and suffered no loss on the disposal and the recipient shall be deemed to have acquired the assets at an acquisition price equal to the acquisition price paid by the donor plus the permitted expenses incurred by the donor. (emphasis added)

Paragraph 12, sch. 2 to the Real Property Gains Tax Act 1976 lists down only three categories of people recognised by the Act for the purposes of a disposal of asset by way of a gift. They are husband and wife, parent and child and grandparents and grandchildren. Hence, the relationship of uncle and nephew clearly does not fall within the recognised or permitted category under the 1976 Act to claim that a particular transaction was a gift from the donor/transferor to the donee/transferee.

On the facts before me and the law, I am unable to conclude that the plaintiff was transferring the said property as gifts to the 2nd and 3rd defendants as the element of natural love and affection has never been established by the defendants generally or the 2nd and 3rd defendants specifically. As adumbrated above, the evidence shows otherwise, in that there is no emotional attachment or feeling between the plaintiff and his nephews *viz*. the 2nd and 3rd defendants. I therefore hold that s. 26(a) of the Contracts Act 1950 does not apply to the facts of this case nor to persons standing in the position of uncle and nephews. This finding also covers the overlapping ground based on s. 340(2)(b) of the Code that the transfer was obtained by means of a void and/or insufficient instrument contained in Form 14A.

On the aforesaid finding and reasons aforesaid, I allow the plaintiff's claim and give an order in terms of the plaintiff's statement of claim as particularised earlier in this judgment, *viz*. the relief as prayed in para. 6(1), 2(a), (b) and (c). Costs to the plaintiff.